

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1148

In The
United States Court of Appeals
For The Second Circuit

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UNITED STATES OF AMERICA,

Appellee,

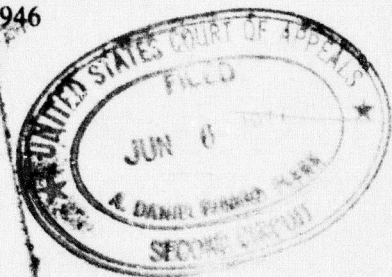
vs.

JAMES STANLEY KORZENIEWSKI, Jr.,

Appellant.

**BRIEF FOR APPELLANT JAMES STANLEY
KORZENIEWSKI**

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POINT I

THE DISTRICT COURT ERRED IN REMOVING THE QUESTION OF THE EXISTENCE OF THE CONSPIRACY FROM THE JURY, IN PERMITTING THE GOVERNMENT'S CHIEF WITNESS, KUZNIEWSKI, TO TESTIFY IN HIS AIR FORCE UNIFORM, IN PERMITTING THE GOVERNMENT'S EXPERT TO TESTIFY IN AN AREA WHERE HE WAS NOT A COMPETENT WITNESS AND IN FAILING TO COMPLY WITH GEANEY STANDARDS IN RULING ON STATEMENTS ON CO-CONSPIRATORS.

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POINT II

THE DISTRICT COURT ERRED IN IMPOSING DISPARATE SENTENCES, INCLUDING JAIL TERMS ON DEFENDANTS KORZENIEWSKI AND MILLER, WHO ELECTED TO STAND TRIAL WHILE IMPOSING SUSPENDED SENTENCES AND PROBATION ON VIRTUALLY ALL MAJOR PERPETRATORS, PARTICULARLY THOSE WHOSE CO-OPERATION WAS MADE KNOWN BY THE PROSECUTOR TO THE TRIAL JUDGE, THE PRACTICAL EFFECT OF WHICH WAS TO DEPRIVE BOTH DEFENDANTS OF THEIR RIGHT TO A TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 9

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES STANLEY KORZENIEWSKI, JR.,

APPELLANT.
-----x

Docket No. 77-1148

BRIEF FOR APPELLANT JAMES STANLEY KORZENIEWSKI, JR.

JAMES STANLEY KORZENIEWSKI, JR., appeals from his conviction on February 4th, 1977, in the United States District Court for the Eastern District of New York (Costantino, J.) upon a jury verdict of conspiring to manufacture, possess and distribute phen-cyclidine (PCP), on the street known as 'angel dust'. 21 U.S.C. 841 (a) (1), 846. He was sentenced to a period of three years, two months of which was to be served in confinement, the balance of two years, ten months to be on probation, with, in addition, five years of special parole.

Counsel on this Appeal was also Trial Counsel for defendant JAMES STANLEY KORZENIEWSKI, JR. and both for the trial and this appeal was assigned under the C.J. A.

WILLIAM JAMES (BILLY) MILLER was tried and convicted

with KORZENIEWSKI and was sentenced to two years with two months confinement, with, in addition, five years probation and two years special parole. His appeal is being prosecuted jointly with this.

ISSUES PRESENTED FOR REVIEW

Issue number I: Whether the credibility of the government's witnesses was improperly and crucially aided by actions and rulings of the District Court, consisting of the following:

- 1) A direction to the jury that the evidence showed an illegal conspiracy, thereby removing essential elements of the crime from its consideration.
- 2) Permitting a crucial Government witness, whose credibility was in doubt, to testify in his Air Force uniform.
- 3) Permitting the Government's chemist to testify as an ordinary witness, rather than an expert, when he had no competence to give such testimony, and
- 4) Making premature rulings under United States v. Geaney, and stating in the course thereof to the jury that it agreed that Miller had joined the conspiracy.

Issue number II: Whether the District Court erred in imposing disparate sentences, including jail terms on defendants KORZENIEWSKI and co-appellant MILLER, who alone elected to stand trial, while imposing entirely suspended sentences and probation on virtually all major perpetrators who pleaded guilty, particularly those whose co-operation was made known by the prosecutor to the trial judge and whether the practical effect of such sentences was to deprive both KORZENIEWSKI and MILLER of their right to a trial under the Sixth Amendment of the United States Constitution.

STATEMENT OF FACTS

The most vital issue at the trial was the credibility of the Government's chief witnesses, ROBERT KUZNIEWSKI and JOSEPH PALMIN-TERI, both having organized and controlled several angel dust (PCP) groupings, along with several others. Both were indicted, though under separate indictments, but had pleaded guilty and testified for the Government after both were promised by the prosecution, euphemistically, that their co-operation would be made known to the Court after the trial. Both defendants KORZENIEWSKI and MILLER testified and denied any involvement.

The Kuzniewski-Palminteri-Janusez Partnership

Angel Dust is made from common industrial chemicals (28-29). When placed on mint leaves, which in turn are rolled into cigarettes, it produces the effects those smoking these substances apparently seek (35).

Robert Kuzniewski majored in Chemistry for two years at Queens College. By 1975 he was a dropout, unemployed (21) and without steady means to sustain himself except that he did know how to manufacture PCP and with a negligible investment for the chemicals could make \$900 to \$1,000 for each pound he produced. In June, 1975, he formed a partnership with Joseph Palminteri and Mark Janusez to produce and distribute PCP (36). Palminteri helped obtain the chemicals and was the comptroller and accountant for the enterprize (180). Janusez helped obtain chemicals (37) and allegedly brought Miller, who was his fiend, into contact with his partners (182).

This partnership on three separate occasions during the summer and fall of 1975 made trips to the summer home of co-defendant Judd Lucas in Ellenville, New York, where they manufactured and later distributed 39 pounds of phencyclidine, (PCP). (96-97).

Sometime after, Janusez told Palminteri that he would be responsible for giving the angel dust to Miller and Korzeniewski (188, 198); and Kuzniewski said that he would be responsible for mixing the angel dust on mint leaves for them. Neither Miller nor Korzeniewski was present when these statements were made, nor when Janusez told Palminteri that they had received \$700 from Miller (207-08) and how it had been split (211-13).

THE NOVEMBER SALE

In November, 1975, Kuzniewski gave Miller a pound of PCP (42-43) for which Miller is alleged to have paid him \$150 (47). Kuzniewski stated that he had a conversation with James Korzeniewski at the corner of Eckford Street in Greenpoint and asked him who he had dealing for him and asked further, "Do you have a person by the name of Ming dealing for you?" Further, he asked "I notice you have a whole bunch of little kids dealing for you?" Both of said questions he claims Korzeniewski answered yes.

INDICTMENT AND TRIAL

In May, 1976, the Government filed indictment 76 CR 331 charging Palminteri, Janusez, Miller, Korzeniewski and several others with conspiracy to violate title 21 (A 5). By the trial in October a disposition had been reached with all the defendants except Miller and Korzeniewski. Kuzniewski was then in the Air Force, and wore his uniform while he testified (21). After

defendants cross-examined Palminteri, the Government was permitted to introduce as a prior consistent statement (438) his notebook around the time in question showing two sales to "Billy", whom he identified as Miller, for \$1,000/pound (443).

The Government's chemist expressed the opinion based on Kuzniewski's testimony that the chemical he had made was phencyclidine (493). He was also permitted to testify, however, that he had discussed the synthesis of PCP with Kuzniewski and that based on those discussions he felt Kuzniewski knew how to make the drug (A 46). Both Korzeniewski and Miller testified during the trial and denied the purchases attributed to them.

At an early point in the trial (the District Court having heard only the testimony of Kuzniewski, its first witness) it instructed the jury that the Kuzniewski partnership to make and sell PCP "was illegal" and that there was "no question about it". The only issue for the jury according to the Court, was "whether these two gentlemen sitting here had anything to do with it". (A 44).

Kuzniewski, questioned by counsel for Korzeniewski, stated that he had produced between 50 and 60 pounds of PCP and perhaps as much as 85 pounds during his three years as a producer with different partners. (149).

Following the testimony of defendant Miller's witness, Robert Higgins, the prosecution produced a rebuttal witness to discredit Higgins' testimony (664) but prior to said witness, who was co-defendant Judd Lucas, taking the stand, he was advised that if he agreed to testify pursuant to the subpoena, then the U.S. Attorney "would make his co-operation known to the judge prior to his sentencing". (662)

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN REMOVING THE EXISTENCE OF THE CONSPIRACY FROM THE JURY, IN PERMITTING KUZNIEWSKI TO WEAR HIS AIR FORCE UNIFORM, IN PERMITTING THE EXPERT TO TESTIFY IN AN AREA WHERE HE WAS NOT A COMPETENT WITNESS, AND IN FAILING TO COMPLY WITH GEANEY STANDARDS IN RULING ON CO-CONSPIRATOR STATEMENTS.

The district court committed error in four respects, the cumulative effect of which was to deny Korzeniewski a fair trial, and which require reversal. All are important not only as errors in themselves but because they aided the Government in bolstering the credibility of Kuzniewski and Palminteri, when their credibility was the crucial issue in the case.

First, the district court was clearly wrong in instructing the jury at the outset of the case that there was a conspiracy, that the conspiracy was illegal and that the sole issue was whether the trial defendants joined it (A 44). Only the jury could decide if the Government proved its case, and this encompassed every element of the crime charged, including whether the drug in question was indeed phencyclidine, whether it was made for distribution, whether Kuzniewski really had a partnership and so forth. The court's instructions took these elements from the jury and left only the question of defendant's agreement to join. At the same time it improperly bolstered the Government's case on that agreement by directing the jury to accept Kuzniewski and Palminteri on the fact that a conspiracy existed.

This error, United States v. Clark, 475 F. 2d 240, 248 (2d Cir. 1973) (reversal where jury has been "confused" or left with an "erroneous impression" on essential elements of the crime), United States v. Fields, 466 F. 2d 119 (2d Cir. 1972) (every element must be submitted), was not saved by stipulation of defense counsel (A 45), or the formal charge. The district court compelled the former without any right to or justification for doing so; and the formal charge in general terms at the end of the case could not erase the earlier instruction taking elements from the jury's consideration, even if it had purported to do so, which it didn't. United States v. Byrd, 352 F. 2d 570 (2d Cir. 1965) (reverse where jury confused on essential element even when that element was covered in other parts of the charge).

Second, the district court was clearly wrong in permitting the Government chemist to testify that Kuzniewski knew how to make PCP. As one who had no other involvement with the case, the witness could testify only about the product, that is whether as described in testimony, it was or was not PCP. His right to render an expert opinion went no further than that. F.R. Evid. 701.

Once he talked about Kuzniewski and his abilities, as distinguished from a neutrally described product, he became an ordinary witness giving non-expert testimony about the facts in controversy. However, this testimony was plainly incompetent. F.R. Evid. 602. It served doubly to harm defendants by again bolstering Kuzniewski's credibility.

Third, the district court erred in permitting Kuzniewski to wear his Air Force uniform while testifying. The uniform told

the jury that although he might have erred in the past, Kuzniewski had repented and was now telling the truth, as evidenced by the United States Government having accepted him into the Air Force. Thus the prosecutor cleverly but improperly brought the weight of the Armed Forces in support of Kuzniewski's credibility. See La Rocca v. Lane, 37 N.Y. 2d 575 (1975) (priest may not appear in clerical garb when acting as attorney); ABA, Standards Relating to the Prosecution Function, Sec. 5.18 (unprofessional conduct for prosecutor to express personal belief in credibility of his witness).

Finally, the district court erred in ruling on statements of alleged co-conspirators outside defendant's presence. F.R. Evid. 801 (d) (2) (E). These first came in when the only non-hearsay evidence as to Korzeniewski's participation at that point in time was Palminteri's testimony that he and Korzeniewski had negotiated about price. In the first place the district court made final rulings then, rather than as United States v. Geaney, 417 F. 2d 1116, 1120 (2d Cir. 1969) commands, "when all the evidence is in". See also United States v. Trotter, 529 F. 2d F. 2d 806, 811-12 (3d Cir. 1976); United States v. Glazer, 532 F. 2d 224, 228-29 (2d Cir. 1976); United States v. Wiley, 519 F. 2d 1348 (2d Cir. 1975). In Geaney, decided in the 2d Circuit, Friendly J., held in determining admissibility of hearsay evidence under the exception for declarations of co-conspirators, the trial judge should determine whether defendant's participation in the alleged conspiracy was established by a fair preponderance of non-hearsay evidence. If there has been such proof, the jury is to consider such hearsay with all the other evidence in determining guilt

beyond a reasonable doubt; if there has not been such proof, the judge must instruct the jury to disregard hearsay, or if the hearsay was so large a proportion of the proof, as to render a cautionary instruction to the jury of doubtful utility, he should declare a mistrial on defendant's request.

In United States v. Randazzo, 56 F. 2d 601; it was held that "a party to be implicated in a conspiracy must be shown independently to be in fact, a party to the venture; else there is no authority to act for him. In the Randazzo case there was no evidence offered against the defendant except the alleged co-conspirator's declarations, and therefore, the conviction was reversed."

In the second place, the court stated before the jury that it accepted the Government's position that 'we have a conspiracy already' (A 47), vouching for the credibility of the Government's witnesses. Lastly, it failed to apply a discriminating analysis which could have resulted in limiting instructions. We doubt, for example, that that and later testimony was admissible against Korzeniewski since he spoke nothing at the meeting negotiating price and was implicated only by ambiguous silence.

POINT II

THE DISTRICT COURT ERRED IN IMPOSING DISPARATE SENTENCES, INCLUDING JAIL TERMS ON DEFENDANTS KORZENIEWSKI AND MILLER, WHO ALONE ELECTED TO STAND TRIAL, WHILE IMPOSING ENTIRELY SUSPENDED SENTENCES AND PROBATION ON VIRTUALLY ALL MAJOR PERPETRATORS WHO PLEADED GUILTY, PARTICULARLY THOSE WHOSE CO-OPERATION WAS MADE KNOWN BY THE PROSECUTOR TO THE TRIAL JUDGE, THE PRACTICAL EFFECT OF WHICH WAS TO DEPRIVE BOTH DEFENDANTS OF THEIR CONSTITUTIONAL RIGHT TO A TRIAL UNDER THE SIXTH AMENDMENT.

The district court meted out the following sentences to each of the below-named parties all of whom pleaded guilty and all of whom were self-admitted and self-described manufacturers, distributors and sellers of PCP:

Joseph Palminteri, sentenced to 1 year plus two years special parole term, plus placed on probation for five years. and the execution of the one year sentence was suspended.

Robert Kuzniewski, sentenced pursuant to T-18 U.S.C. Sec. 5010 (a) under special conditions that the probate department maintain contact with Kuzniewski's Air Force commanding officer.

Marek Janusez, sentenced to prison for 3 years, but execution of sentence was suspended; he also was placed on probztion for five years and given special parole term of five years, in addition to having to pay a \$3,000 fine within two years.

Daniel Graf, sentenced to 3 years, but execution of sentence was suspended; he also was placed on probation for 3 years and given fiVe years special parole.

Victor Szwarcz, sentenced to 3 years in prison, but execution of sentence was suspended, and defendant was also placed on 3 years probation and given 3 years special parole.

Judd Lucas, sentenced to probation only for a period of 5 years, pursuant to T-18 U.S.C., Sec. 5010 (a).

Kuzniewski, Palminteri and Lucas all testified for the prosecution.

All were made the same promises and all had their co-operation made abundantly clear to the trial judge and each was not only a major perpetrator in one or more of the groups but each was in his own way a kingpin or leader in the manufacture and distribution

and sale of PCP ranging in amounts up to 85 pounds and Lucas in particular utilized his father's home in Ellenville, New York for his nefarious activities.

Marek Janusez made it abundantly clear to the prosecution and to his friends among the defendants that he would not testify for the prosecution although he made it clear that he would and did make whatever statements the prosecution required of him and that alone saved him from going to prison.

There appears to be a clear pattern for those who pleaded guilty and particularly those who made the prosecution case and brought all the hearsay and uncorroborated statements to bear against defendant Korzeniewski, the reward was soon forthcoming and not one of those was sentenced to a day in prison and for those who maintained their innocence jail was their reward.

CONCLUSION

In an otherwise simple case in which a mistrial could have been directed or a motion to dismiss entertained, the jury deliberated most of two days, obviously doubting the credibility of the prosecution's witnesses and several times asking for instructions and to re-hear testimony of the Government's deals with Kuzniewski and Palminteri. Korzeniewski was entitled to a consideration of their credibility free from the errors which improperly weighted the issues in the Government's favor.

Furthermore, there should be a reconsideration and fairer sentence imposed on the defendants whether or not they stood trial. The Sixth Amendment to the United States Constitution does not only mandate that defendants be given a trial before

a jury of their peers, that all charges be made known to them in advance, that they be given a speedy trial but that there should be complete and unqualified assurance given by word and deed by the court to all defendants that they have an unvarying right to such a trial and that they will not be punished or threatened with a harsher penalty for demanding what is their right and that they should not be induced by blandishment or veiled promises which cannot be clearly expressed to accept a plea of guilty or be induced to make out a case for the prosecution where no case exists for such reward.

The judgment below should be reversed, and a new trial ordered.

Respectfully submitted,

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